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No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1972

REV. FRANCIS X. LAWLOR, et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Rev. Francis X. Lawlor, *et al.,* pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled clause on April 10, 1972.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, *infra,* pages 1a-5a is unreported at present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on April 10, 1972. This Petition for Writ of Certiorari will be timely filed on or before July 10, 1972.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1) Whether the Respondents' actions producing and consolidating rapid and drastic increases in the numbers of black students attending public schools in Petitioners' unstable, racially peripheral area constitute discriminatory state action violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

2) Whether previous judicial enforcement of privately contracted racially restrictive covenants constitutes *de jure* segregation?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the United States Constitution provides in pertinent part:

> "No state shall . . . deny to any person within its Jurisdiction the equal protection of the laws."

STATUTE INVOLVED

42 U.S.C. Section 1983 provides as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

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or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The Petitioners live in an unstably integrated, racially peripheral area immediately adjacent to racially segregated areas of the City of Chicago, Illinois. (A.6, 19-22, 36).[1] On December 15, 1970, Petitioners filed a Complaint in the United States District Court for the Northern District of Illinois, Eastern Division, charging that Respondents, by consciously and deliberately causing and accelerating rapid and drastic increases in the numbers of black students attending public schools in Petitioners' area, had violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 1983 of Title 42 U.S.C. for the following reasons:

A) Respondents know and understood that whenever such increases had been made in the past in areas racially similar to the Petitioners' area the consistent, unvarying and inevitable result had been the continuation, aggravation, acceleration and extension of racial segregation;

B) Respondents had admitted and were aware, before creating said increases in Petitioners' area, that such increases inevitably and predictably produced and accelerated racial segregation by inevitably and predictably increasing the rate at which whites left racially peripheral areas;

C) Respondents had admitted and were aware that schools in which such increases raised the number of

[1] "A" refers to the Appendix in the Court of Appeals.

black students to exceed the range of ten to twenty-five percent of the total student body would inevitably become segregated schools due to state action and that integrated residential areas could not be maintained after the schools within that area became segregated;

D) Despite and in disregard of the aforementioned knowledge, Respondents formulated and implemented practices that caused or tangibly accelerated rapid and drastic increases in the numbers of black students attending elementary and high schools in the Petitioners' area during the period between 1963 and 1970;

E) Said increases directly, inevitably and demonstrably accelerated the rate at which whites left the schools and homes in Petitioners' area, producing a situation where, by 1970, the Respondents knew the schools in Petitioners' area were in immediate danger of becoming irrevocably segregated schools surrounded by irrevocably segregated residential extensions of the black segregated community;

F) Respondents consistently ignored all proposals of Petitioners, and of educational experts hired by Respondents to restore viable integregation to Petitioners' area, and Respondents also failed to initiate any meaningful proposals to halt, or slow down, the segregation of Petitioners' schools and community.

The Complaint prayed for the following relief:

A) That the Court declare the unconstitutionality of, and enjoin, Respondents' policies and practices creating rapid and drastic increases in the numbers of black students attending integrating and integrated schools located in unstable racially peripheral neighborhoods adjacent to segregated neighborhoods;

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B) That the Court order Respondents to stop ignoring the segregation of the schools and neighborhoods in Petitioners' area and to adopt some meaningful proposals to at least attempt the restoration of viable integration to said schools and neighborhoods;

C) That the Court restrain the construction of temporary facilities that Respondents intended to consolidate and perpetuate the aforementioned rapid and drastic increases Respondents had created in the numbers of black students attending schools within Petitioners' area.

On December 18, 1970, the Respondents filed a motion to strike and dismiss the complaint. On December 21, 1970, the District Court granted Respondents' motion to dismiss the complaint for lack of specificity, and granted Petitioners leave to file an Amended Complaint, which Petitioners filed on December 31, 1970. The amended complaint enumerated the same causes of action in greater factual detail and requested the same relief and Respondents moved to strike and dismiss it on January 6, 1971 for failure to state a cause of action, which motion the District Court granted on January 10, 1971, at which time the District Court also granted Petitioners leave to file a Second Amended Complaint.

On January 29, 1971, the Petitioners filed their Second Amended Complaint, enumerating the same causes of action in even greater factual detail, and requesting the same relief, predicated upon the same legal theories (A. 4-46).

On February 26, 1971, the District Court struck and dismissed the Second Amended complaint for failure to state a cause of action. (A. 55-56). Petitioners filed an immediate Notice of Appeal (A. 56). The case was argued

before the Seventh Circuit Court of Appeals on November 8, 1971 and decided by that Court on April 10, 1972. (a. 1a).[2]

On Appeal, the Seventh Circuit Court of Appeals affirmed with the following language:

> "We hold that the district court did not err in dismissing the complaint since the allegations taken as true do not show a 'deprivation of constitutional rights' necessary to sustain plaintiffs' complaint . . . the mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful invidious discrimination. (a. 3a-4a).

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[2] "a" refers to the Appendix to the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

(I)

This Court is being asked to determine two important, closely intertwined questions of Constitutional law involving the equal protection clause of the Fourteenth Amendment to the United States Constitution. The various United States Circuit Courts of Appeals are divided and conflicting upon these questions because this Court has not yet determined what their answers are. The questions are:

A) Does state action taken with the knowledge that its inevitable consequence must be the creation, consolidation, and acceleration of racial segregation constitute the "purposeful invidious discrimination" clearly violative of equal protection of the laws?

B) Does such state action violate equal protection of the laws irrespective of the intent motivating the action?

(A)

Both of the aforementioned questions were answered negatively by the District and Appellate Courts in the instant case, and affirmatively by the District and Appellate Courts in *Keyes* v. *School District No. 1, Denver, Colorado,* 303 F. Supp. 279 and 289 (D.Colo. 1969); *stay pending appeal granted* (10th Cir.); *stay vacated* 296 U.S. 1215 (1969); *trial on the merits,* 313 F. Supp. 61 and 90 (D. Colo., 1970); *appeal* 445 F.2d 990 (10th Cir. 1971), *cert. granted,* ..... U.S. ..... (1972). This Court has already granted a Writ of Certiorari in *Keyes,* where black petitioners were granted the relief white petitioners at bar have been denied.

It is clear that equal protection condemns state action intentionally designed to maintain, accelerate, or extend

racial segregation in public schools. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954). It should be equally clear that an actor "intends" the natural and probable consequences of his acts, and that when those consequences become so natural and probable as to be virtually certain the actor's desire to achieve those consequences becomes similarly definite. (The Restatement of Torts, Sec. 500, Comments f and g at page 1296, 1934). This Court has already followed this approach in the analogous area of ascertaining when violations of the Federal Civil Rights Act, 42 U.S.C.A. Sec. 1983, have occurred. In *Monroe* v. *Pate,* 365 U.S. 167 (1961), this Court held complaints under the Civil Rights Act should not be dismissed for failure to allege a specific intent on the part of the defendant to deprive the plaintiff of a federally protected right because such cases should be construed against the general background of tort liability that makes an actor responsible for the natural consequences of his actions. Based on this reasoning, the Court held that when a defendant takes actions which will inevitably produce violations of federally protected rights, the defendant should be liable for violations of the Act even if he did not have the specific intent to violate it.

Moreover, the most recent decision of the 10th Circuit Court of Appeals in *Keyes* v. *School District No. 1, Denver Colorado,* 303 F. Supp. 279 and 289 (D. Colo., 1969); *stay pending appeal granted* (10th Cir.); *stay vacated* 396 U.S. 1215 (1969); *trial on the merits,* 313 F. Supp. 61 and 90 (1)., Colo., 1971) *appeal* 445 F.2d 990 (10th Cir. 1971) *cert. granted* ..... U.S. ..... (1972), held that the Respondents' treatment of the Park Hill Area schools in Denver constituted purposeful, intentional discrimination without disturbing, and because of, the lower court finding that:

> "We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions, the action is unquestionably willful." 303 Fed. Supp. 279 at 286.

The state action allegedly violative of equal protection in *Keyes* and the instant case . . . "must be viewed against its historical background and context . . . [because] intent, purpose and motivation, while unclear or uncertain if only isolated acts are considered, become defined and recognizable when a total court of conduct is carefully scrutinized." *Taylor* v. *Board of Education of New Rochelle,* 191 F. Supp. 181 (S.D.N.Y. 1961), *aff'd,* 294 F.2d 36 [2nd Cir., 1961]. The similarities between the contexts of the instant case and *Keyes* are striking.

In *Keyes,* specifically ascertainable portions of the City of Denver, Colorado, constituted black segregated residential communities which were surrounded by equally ascertainable racially peripheral areas, and which were expanding at a known rate in a definite direction. 303 F. Supp. 279 at 282. Despite this knowledge, the Respondents in *Keyes* followed policies and practices inevitably resulting in the creation, consolidation and acceleration of racial segregation by:

A) Building schools in locations which were selected by supposedly objective criteria, but which, because of the ascertainable movement patterns of the negro community, were inevitably destined to become, and did in fact become, segregated institutions. 303 F. Supp. 279 at 282;

B) Creating and maintaining large and rapid increases in the numbers of black students attending integrated

schools (303 F. Supp. 289 at 291 and 293-295), located within the Park Hill Area when that area was an unstable, racially peripheral community. 303 F. Supp. 279 at 285;

C) Refusing to transfer any black students out of rapidly segregating Park Hill schools to other schools where said black students could be more viably integrated. 303 F. Supp. 289 at 293;

D) Building additional classrooms into, and putting mobile units into service at, already overcrowded and segregated schools, (303 F. Supp. 289 at 289-293), so that, "The natural and probable consequence of the Board's action (in building the additional classrooms at and assigning mobile units to, the segregated schools in question), was to continue the containment of negro students ... in overcrowded, segregated schools ... The effect of the mobile units and additional classrooms was to solidify segregation at (such schools), increasing . . . [their] capacity to absorb the additional influx of Negro population into the area." 303 F. Supp. 289 at 292-293;

E) Increasing the numbers of negro students attending elementary schools that "fed into" Park Hill area high schools. 303 F. Supp. 289 at 294;

F) Ignoring the warnings of their own experts that a pattern of segregation was developing in Denver, and that Respondents' actions were contributing to the acceleration and expansion of that pattern. 303 F. Supp. 279 at 284.

Each of the above cited elements was condemned as an element of *de jure* segregation in *Keyes* because, "The school board knew the consequences and intended or at least approved of the resultant racial concentrations," (313 F. Supp. 61 at 65) and because, "The ultimate effect

of the Board's actions and policies in the face of the steady influx of negro families into the area was to create and maintain segregated situations." 393 F. Supp. 289 at 294-295.

Chicago, in the instant case, like Denver in *Keyes,* has a definite, ascertainable, and predictably expanding segregated residential community (A. 5-7; 20-22), and was never subjected to the patently intentional "dual" *de jure* segregation clearly condemned in *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954). Furthermore, Respondents at bar, like the Respondents in *Keyes,* have been following policies and practices inevitably creating, consolidating and accelerating racial segregation by rapidly and drastically increasing the numbers of black students in racially peripheral areas. Respondents have admitted these increases inevitably produce segregation. (A. 7, 23-28). Respondents have ignored the warnings of their own experts that these increases are inevitably contributing to the expansion and acceleration of racial segregation in Chicago. (A. 25-26; 28). Perhaps most importantly of all, the actual practical experience in Chicago, as in Denver, has been that whenever such increases are produced or consolidated in racially peripheral areas by such practices as boundary changes, (A. 8, 28), designation as general receiving schools into which only blacks would want to transfer, (A. 8, 28), permissive transfers, (A. 8, 28), construction of temporary facilities at already overcrowded and segregated schools, (A. 8, 29-30), reclassification, (A. 8, 11), and the creation of upper grade centers which concentrate black students in the center itself and the schools feeding into and out of it, (A. 8-9, 30-31), the direct, unvarying, and thoroughly predictable result has *always* been a consolidation, acceleration and extension of racial segregation substantially attributable to state ac-

tion. (A. 7-10, 23-31). Despite this knowledge, Respondents are creating such increases in Petitioners' area (A. 6, 11-15, 19-22, 37), which, as a direct result, is rapidly becoming irrevocably segregated. Respondents foresaw, and therefore "intended" this result for purposes of the Fourteenth Amendment, although the Seventh Circuit opinion in the instant case failed to make any reference to the obvious similarities between the instant case and *Keyes*. (a. 1a-5a).

(B)

The lower Courts are clearly divided over the issue whether state action inevitably producing, consolidating or accelerating racial segregation must also be motivated by a deliberately discriminatory intent to violate the Fourteenth Amendment's guarantee of equal protection of the laws. The Ninth Circuit, in *Southern Alameda Spanish Speaking Organization* v. *City of Union City, California,* 424 F.2d 291 (9th Cir., 1970) and the Second Circuit, in *Norwalk C.O.R.E.* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968), and *Kennedy Park Homes Assn.* v. *City of Lakawanna, N.Y.,* 436 F.2d 108 (2nd Cir. 1970), *cert. denied,* ..... U.S. ....., 91 S. Ct. 1256, April 5, 1971, have held that lack of discriminatory intent will not protect state action producing an inescapably discriminatory effect. The position of the Seventh Circuit is unclear on the issue. The Seventh Circuit decision in the instant case required "purposeful invidious discrimination", (a. 4a), as well as inevitably discriminatory effect to violate equal protection; citing in support thereof *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55, 62 (6th Cir. 1966) *cert. den.* 389 U.S. 847; *Springfield School Comm.* v. *Barksdale,* 348 F.2d 261, 264 (1st Cir. 1965); *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (10th

Cir. 1964), *cert. den.* 380 U.S. 914 and *Bell* v. *School City of Gary,* 324 F.2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (a. 4a). In 1971, however, the Seventh Circuit decided *Gautreaux* v. *Romney,* ..... F.2d ..... 40 L.W. 2172 (7th Cir., *decided* September 10, 1971), in direct opposition to the decision in the instant case on this issue. In *Gautreaux,* suit was brought against the Secretary of Housing and Urban Development (H.U.D.) to enjoin his providing federal monies to the Chicago Housing Authority. The Secretary was found to have no specific discriminatory intent in turning over the funds to C.H.A., but he knew that the C.H.A. allowed the aldermen of the Chicago City Council to veto proposed locations where federal funds would be used to construct public housing projects. The aldermen regularly deferred to the wishes of their constituents in the exercise of this veto, with the result that the housing projects, which had mainly negro inhabitants and waiting lists, were never located in white areas. Earlier litigation had condemned C.H.A. for allowing the Chicago aldermen to maintain this veto power although the specific finding was made that neither the C.H.A. nor the aldermen had any specific discriminatory intent. *Gautreaux* v. *C.H.A.,* 265 F. Supp. 582 (N.D. Ill. 1967); 296 F. Supp. 907 (1969); 436 F.2d 306 (7th Cir. 1970). The Seventh Circuit condemned defendant Romney's defense that he, like the C.H.A. and the Chicago Aldermen, lacked a specific discriminatory intent, holding that equal protection was violated because the entire process instituted when Romney granted federal funds to the C.H.A. produced an inevitably discriminatory effect. The exact language of the opinion was:

> "Alleged good faith is no more a defense to segregation in public housing than it is to segregation in

> public schools . . . it is no consolation to an individual denied the equal protection of the laws that it was done in good faith. ..... F.2d ....., (7th Cir. 1971), 40 L.W. 2172 (decided September 10, 1971).

The Seventh Circuit in *Gautreaux* v. *Romney* cited *Kennedy Park Homes Assn.* v. *City of Lakawanna, N.Y.*, 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, ... U.S. ..... 91 S. Ct. 1256, April 5, 1971, for the proposition that discriminatory effect without discriminatory intent can condemn state action under equal protection. The validity of this proposition will be inevitably at issue in the resolution of *Keyes* v. *School District No. 1, Denver, Colorado*, 303 F. Supp. 279 and 289 (D. Colo. 1969); *Stay pending appeal granted* (10th Cir.); *stay vacated*, 396 U.S. 1215 (1969); *trial on the merits*, 313 F. Supp. 61 and 90 (D. Colo; 1970), *cert. granted* ..... U.S. ..... (1972),[3] and is amply established by the interpretation this Court has already given to the equal protection clause of the Fourteenth Amendment.

Simply put, that interpretation has always condemned state action with an inevitably discriminatory effect, ir-

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[3] Other recent lower court decisions condemning, under equal protection, inevitably discriminatory results irrespective of the presence or absence of discriminatory intent include: *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. Columbia, 1967), *aff'd. Sub nom., Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir., 1969); *Branche* v. *Board of Education of Town of Hempstead*, 204 F. Supp. 150 (E.D.N.Y., 1962); *Penn* v. *Stumpf*, 308 F. Supp., 1238 (N.D. Calif. 1970); *Bradley* v. *Milliken*, ... F. Supp. ....., 40 L.W. 2192 (E.D. Mich. *decided* September 27, 1971), and *Davis* v. *School District of City of Pontiac, Inc.*, 309 F. Supp—. 734 (E.D. Mich. 1970, *cert. denied* ..... U.S. ..... (1971), and *Johnson* v. *San Francisco Unified School District*, 339 F. Supp. 1315 (N.D. Calif. 1971).

respective of the intent motivating the action, as well as intentionally discriminatory state action.[4]

Thus, in *Smith* v. *Texas*, 311 U.S. 128 (1940), the Court reversed a rape conviction an all white Texas jury had rendered against a Negro defendant. Further analysis disclosed that Texas law allowed local jury selectors to systematically exclude Negroes from local juries. In defending this systematic exclusion against the contention it violated equal protection, the Respondents contended their regular selection of white *venire* men was not based upon specific discriminatory intent but was simply predicated on their policy of selecting jurors they knew, and that they never selected Negro jurors because they didn't know any Negroes. The Court held that equal protection would be violated, even if what Respondents said was true and no specific discriminatory intent motivated state action producing an inevitably discriminatory effect by allowing white jury selectors who knew no Negroes to select only jurors they knew. 311 U.S. 128 at 132.

Similarly, in *Shelley* v. *Kramer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of privately contracted racially restrictive covenants would violate the

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[4] This interpretation was recently further clarified in *Wright* v. *Council of the City of Emporia*, ... U.S. ....., 40 L.W. 4806 (June 22, 1972), where the Court stated:

> "It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may *add* to the discriminatory *effect* of the action by intensifying the stigma of implied racial inferiority." ..... U.S. ....., 40 L.W. 4806 at 4810 (emphasis added).

As this passage implies, the discriminatory effect, if sufficiently certain, can condemn the state action even without the "addition" of a demonstrated discriminatory purpose.

equal protection clause because, although the judicial enforcement of said covenants would clearly not be motivated by any discriminatory intent, the effects of such enforcement would be inevitably discriminatory. A similar result was reached in *Barrows* v. *Jackson,* 346 U.S. 249 (1953), where impartial state courts were enjoined, under equal protection prescriptions, from assessing damages against a white defendant who had breached a racially restrictive covenant. The *Barrows* decision was unequivocally based on the inevitably discriminatory effect of the proscribed judicial enforcement because the defense of lack of discriminatory intent, having been breached in *Shelley,* was not even breached in *Barrows.*

Again, in *Griffin* v. *Illinois,* 351 U.S. 12 (1956), the Court held that an Illinois law allowing free appellate transcripts only to those indigent criminal defendants who had been sentenced to death or who alleged constitutional error in their convictions violated equal protection. The Court condemned this Illinois law as an "invidious discrimination", (351 U.S. 12 at 18), because the law had an inevitably discriminatory effect although it was clear the Respondent had no specific discriminatory intent against indigent criminal defendants who could not qualify under the law. This point was clarified by Mr. Justice Burton and Mr. Justice Minton, who based their dissent in *Griffin* on the contention that the Illinois law had not violated the equal protection clause because it was not predicated upon any specific intent to discriminate against non-qualifying indigents. 351 U.S. 12 at 18. Mr. Justice Black, writing the majority opinion, addressed himself specifically to this point and countered it with the rule that inevitably discriminatory results condemn state action under equal protection.

The constitutional concept condemning Respondents at bar for inevitably producing and accelerating segregation in Petitioners' area, irrespective of the intent motivating Respondents' actions, was further delineated in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), where the Court condemned, under equal protection, impartial action the State of Delaware had taken in leasing space in a public building to a private restaurant that, on its own initiative, refused to serve Negroes. In rejecting the defense that the Defendant lacked specific discriminatory intent because the challenged state action would inevitably produce a discriminatory result, the Court held, in language clearly applicable to the instant case, that:

> ". . . no state may effectively abdicate its responsibilities by either ignoring them or merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." 365 U.S. 715 at 725.[5]

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[5] Other decisions of this Court establishing this concept include *Douglas* v. *California,* 372 U.S. 353 (1963); *Goss* v. *Board of Education,* 373 U.S. 683, (1963); *Peterson* v. *Greenville,* 373 U.S. 244 (1963); *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968), and *Baker* v. *Carr,* 369 U.S. 186 (1962). Baker is particularly incisive on the issue because the Court held there that Tennessee's failure to reapportion the voting strength of its counties since 1901 had violated equal protection by producing a totally irrational and purposeless apportionment procedure reflecting no rationale or intent. In rejecting the defense that the admitted lack of specific discriminatory intent sanctioned the Tennessee plan's patently arbitrary and discriminatory effect, the Court held that:

> "Judicial standards under the equal protection clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." 369 U.S. 186 at 226.

The clearly intentionally discriminatory state action encountered and outlawed in *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) is definitely included within, but does not delineate the outer limits of, the equal protection clauses' prescriptions against state action inevitably producing, consolidating and accelerating racial segregation in public schools. The actions of Respondents at bar also fall within those prescriptions, and accordingly, Petitioners respectfully submit that this Court should issue its Writ of Certiorari in order that it may decide these important questions of Constitutional law at the same time they come before the Court in the closely related case of *Keyes* v. *School District No. 1, Denver, Colorado,* 303 F. Supp. 279 and 289 (D. Colo., 1979); *stay pending appeal granted* (10th Cir.); *stay vacated,* 396 U.S. 1215 (1969); *trial on the merits,* 313 F. Supp. 61 and 90 (D. Colo. 1970), *cert. granted,* ..... U.S. ..... (1972).

II

The Respondents cannot continue to ignore the acceleration of racial segregation in Petitioners' area, and have an affirmative duty to ameliorate all manifestations of said segregation, because previous judicial enforcement of privately contracted racially restrictive covenants constituted *de jure* segregation.

Prior to 1948 privately contracted racially restrictive covenants were enforceable in the State of Illinois and the City of Chicago, In 1948, this Court in *Shelley* v. *Kramer,* 334 U.S. 1 (1948), held that judicial enforcement of such covenants amounted to unconstitutional, *de jure* segregation condemned by the equal protection clause of the Fourteenth Amendment. *Barrows* v. *Jackson,* 346 U.S. 249 (1953), further solidified this decision.

The racial complexion of the City of Chicago was, prior to 1948, substantially influenced by the theretofore permissible judicial guarantee of privately contracted racial segregation that amounted to an even stronger form of *de jure* state action than the "encouragement" of segregation condemned in *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). The compacted "ghettos" in which Negro citizens of Chicago lived prior to 1948, and continue to live today, were substantially attributable to the *de jure* state action struck down in *Shelley* and *Barrows* and the residential segregation produced by this state action was, and is, reflected in the segregated patterns of public school attendance in Chicago. [A. 2-27]. Judicial enforcement of racially restrictive covenants prior to 1948 substantially contributed to the establishment of the pattern whereby Negro citizens lived and attended school in compacted, segregated communities, and this pattern has remained the essentially dominant characteristic of Negro existence in Chicago to the present day. (A. 20-22). In short, the state action condemned in *Shelley* and *Barrows* substantially guaranteed that, up to 1948, Negroes would not be able to viably integrate themselves throughout the white community in Chicago and ensured the creation of "ghettos" which Negro settlement has expanded but never broken out of.

De jure state action need only contribute to, and need not be entirely responsible for, racial segregation to violate equal protection. *Taylor* v. *Board of Education of the City School District of the City of New Rochelle,* 191 F. Supp. 191 (S.D.N.Y., 1961), *aff'd* 294 F.2d 36 (2nd Cir. 1961); *United States* v. *School District 151 of Cook County, Illinois,* 404 F.2d 1125 (7th Cir. 1968), cert. denied, ... U.S. ..... (1971). Once the existence of state action that amounts to *de jure* segregation is established the state

bears an affirmative duty to immediately and effectively de-segregate. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968); *Wright* v. *Council of the City of Emporia*, ... U.S. ..... 40 L.W. 4806 (June 22, 1972).

The respondents at bar bear an affirmative duty to immediately and effectively de-segregate petitioners' area and the City of Chicago. Respondents are acting in blatant violation of this duty. Their actions are further accelerating the segregation of Petitioners' area and other areas of the City and Respondents maintain they need not do anything to correct this situation because they fail to recognize the Constitutional fact that population movement channeled, and substantially attributable to, impermissible state action is not "voluntary" population movement beyond Fourteenth Amendment sanctions.

Accordingly, Petitioners respectfully submit that this Court should issue its Writ of Certiorari in order that it may decide this important question of Constitutional law.

CONCLUSION

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 71-1207

REVEREND FRANCIS X. LAWLOR, et al.,
Plaintiffs-Appellants,
v.
BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 3147

WILLIAM J. LYNCH, *Judge.*

ARGUED NOVEMBER 8, 1971 — DECIDED APRIL 10, 1972

Before HASTINGS, *Senior Circuit Judge,* KILEY and KERNER,[1] *Circuit Judges.*

KILEY, *Circuit Judge.* This is an unusual civil rights racial segregation action brought under 42 U.S.C. § 1983[2]

[1] Judge Kerner heard oral argument but did not participate in the adoption of this opinion.

[2] § 1983 Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

by several persons claiming denial of constitutional rights by defendant School Board's administrative actions which allegedly have "forced"[3] "white" residents to move out of, and encouraged the segregation of "black people" within, the O'Toole Elementary School area[4] and its schools. The district court dismissed plaintiffs' second amended complaint. Plaintiffs have appealed. We affirm.

The complaint alleges in substance[5] that prior to 1967 the O'Toole area was a "white residential area" with only "a few if any black persons;" that as a result of certain "practices and policies" of the Board the number of black students in the area schools has risen to well over 10-25%; that this rapid influx of blacks has caused or is causing whites to be "forced" and "driven" out of their schools, homes and businesses; and that the area schools have become or are becoming segregated.

The Board "practices and policies" complained of include the following: 1) boundary changes in attendance areas; 2) reclassification of general attendance to special purpose schools (*i.e.*, technical); 3) construction of temporary facilities to cure overcrowding; 4) a system of "permissive transfers" whereby students from throughout the city can transfer to "receiving schools" within the O'Toole area.

Plaintiffs seek a judicial declaration that they have been denied due process and equal protection of law by defen-

---

[3] "Forced" is used in the sense that "white people" move out because of the increase of "black people" moving in.

[4] We are referring to that area and its schools bounded by 59th Street on the north, Western Avenue on the west, 69th Street on the south and Ashland Avenue on the east. For convenience we refer only to the O'Toole Elementary School, but the complaint also names other schools, *i.e.*, Earle, Harper, Lindbloom.

[5] Many of the allegations are in most general and conclusory terms. Many others are irrelevant. However, we need not, in view of our decision hereinafter, dwell upon infirmities in the pleading.

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dant's alleged invidious administrative "practices and policies." They also seek an injunction which would limit to a range of 10-25% the number of black students in the O'Toole area schools.

We hold that the district court did not err in dismissing the complaint since the allegations taken as true do not show a "deprivation of constitutional rights" necessary to sustain plaintiffs' complaint. *Ehrlich v. Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970); *Sarelas v. Sheehan*, 326 F.2d 490, 491 (7th Cir. 1963); *Kamsler v. M.F.I. Corp.*, 359 F.2d 752 (7th Cir. 1966).

Plaintiffs essentially allege that the Board's "invidious" conduct has increased the number of black residents in the O'Toole School area, "forcing" white residents out and inducing blacks to enter; and increased the number of students in the school beyond the range of 10-25%, "forcing" white students out. The inevitable result of the alleged unlawful conduct, plaintiffs charge, has been to segregate a previously integrated community. This inevitable result, they say, should have been foreseen by the Board.

But a fair reading of the complaint, with the allegations taken as true, clearly does not state a denial of plaintiffs' constitutional rights upon which civil rights relief can be granted. General allegations of the Board's misconduct are limited by other statements and assertions which refute the claims of constitutional misconduct. It is plain from the complaint that the O'Toole School attendance boundaries were not purposefully drawn to "force" whites out or induce blacks to enter. There is no intimation that the operation of the permissive transfer policy discriminated against whites or blacks, or that the construction policies denied equal protection to either race. And plainly there is no basis for an inference that plaintiffs have been deprived of any liberty or property without due process.

Furthermore, the declaration sought with respect to limiting "black students" to a 10-25% range within the O'Toole area schools would deny equal protection of the law to the black people desiring to move into the area and to their children desiring to attend the O'Toole School. And there is no substantive constitutional right to any particular degree of racial balance or mixing. *Swann v. Board of Education,* 402 U.S. 1, 24 (1971). Finally, assuming defendants are deliberately applying the alleged "practices and policies," we see no justification—absent a substantial showing of denial of plaintiffs' rights—for a declaration that the policies are invidiously discriminatory, or for the injunctive relief sought.

The complaint effectually states that racial imbalance results when other whites leave the neighborhood area and its schools, in response to attendance of black students exceeding a range of 10-25%. But the Board policy of permitting black student attendance in excess of 10-25% at the racially changing schools is shown by the complaint not to be the legally sufficient cause of subsequent racial imbalance, since the complaint states that whites move away from the area because blacks move in. And plaintiffs have not shown their standing to complain of deprivation of rights from racial imbalance in schools, resulting solely from departure of other whites, in response to an influx of blacks.

If separation in racially imbalanced schools were the result of unlawful discrimination, school officials would be under an affirmative duty to remedy the situation. However, the mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful invidious discrimination. *Deal v. Cincinnati Board of Education,* 369 F.2d 55, 62 (6th Cir. 1966), *cert. den.* 389 U.S. 847; *Springfield School Comm. v. Barksdale,* 348 F.2d 261, 264 (1st Cir. 1965); *Downs v. Board of Education of Kansas City,* 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914; *Bell v. School, City of Gary,* 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377

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U.S. 924. *See also Offermann v. Nitkowski*, 378 F.2d 22, 24 (2nd Cir. 1967).

In all cases cited by plaintiffs, denials of constitutional rights are involved. For example, in *Monroe v. Pape*, 365 U.S. 167 (1961), the complaint alleged the invasion and search of the Monroe home by police without a warrant. In *Gommillion* v. *Lightfoot*, 364 U.S. 339 (1960), relief was granted because certain "boundary changes" would have deprived plaintiffs of their right to vote. In *Goss v. Board of Education*, 373 U.S. 683 (1963), black students were limited to transferring to schools where their race represented a majority.

We hold that plaintiffs' complaint is fatally deficient for lack of a showing of denial of constitutional rights. There is no basis therefore for the contention that defendants have an affirmative duty to "ameliorate all manifestations" of *de facto* segregation which has developed in the O'Toole area. Absent violation of plaintiffs' constitutional or other federal rights, plaintiffs have no basis for their claim of civil rights relief.

The recent decisions relied on by plaintiffs avail them nothing. In both *Spangler v. Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970), and *Bradley v. Milliken, et al.*, U.S.D.C. (40 U.S.L.W. 2192), there was evidence of discriminatory practices and policies which impinged on plaintiffs' ("black students") constitutional rights to equal school facilities and educational equality.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 71-1207 September Session, 1971

REVEREND FRANCIS X. LAWLOR, et al.,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 3147
William J. Lynch
Judge

JUDGMENT ORDER

ON CONSIDERATION WHEREOF, it is ordered and adjudged that the order of the said District Court in this cause appealed from be and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

April 10, 1972

A true copy
Attest: Kenneth Carrick,
Clerk, U.S. Court of Appeals, 7th Circuit

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Supreme Court, U. S.
FILED
JUL 29 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-48

FRANCIS X. LAWLOR, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-48

REV. FRANCIS X. LAWLOR, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion in this cause of the United States Court of Appeals for the Seventh Circuit correctly stated the law as enunciated in prior decisions of this Court and other lower courts. The judgment and opinion are not in conflict with any decision of any other Court of Appeals and raise no important issue of federal law.

QUESTIONS PRESENTED.

Whether the Court of Appeals was correct in holding that:

1. The District Court did not err in dismissing petitioner's second amended complaint since the allegations thereof taken as true did not show a "deprivation of constitutional rights" necessary to sustain such complaint.

2. It is plain from the complaint that the O'Toole School boundaries were not drawn to "force" whites out or induce blacks to enter; the Board's permissive transfer plicies did not discriminate against whites or blacks, and its construction policies did not deny protection to either race.

3. The declaration sought by petitioners with respect to limiting "black students" to a 10-25% range in the O'Toole area schools would deny equal protection of the law to black people for there is no substantive constitutional right to any particular degree of racial balance or mixing.

4. The mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful, invidious discrimination.

STATEMENT OF THE CASE.

The petitioners, in their second amended complaint, claim denial of constitutional rights by the respondent Board's administrative actions which allegedly have "forced" "white" residents to move out of, and encourage the segregation of "black people" within, the O'Toole Elementary School area and its schools. The Circuit Court affirmed the action of the District Court in sustaining the respondents' motion to strike said complaint and dismiss the action.

The complaint alleges, in general and conclusory terms, that prior to 1967 the O'Toole area was a "white residential area" with only "a few, if any, black persons"; that as a result of certain "practices and policies" of the Board the number of black students in the area schools has risen to over 10-25%; that this rapid influx of blacks has caused or is causing whites to be "forced" and "driven" out of their schools, homes and businesses; and that the area schools have become or are becoming segregated (A. 3-13).[1] The Board's "practices and policies" complained of include the following: 1) boundary changes in school attendance areas; 2) reclassification of general attendance to special purpose schools (i.e., technical); 3) construction of temporary school facilities to cure overcrowding; 4) a system of "permissive transfers" whereby students from overcrowded schools located in the city can transfer to under-utilized "receiving schools" including schools in the O'Toole area (A. 8, 23).

Petitioners' complaint seeks a judicial declaration that they have been denied due process and equal protection of law by respondents' alleged invidious administrative "practices and policies". They also seek an injunction limiting to a range of 10-25% the number of black students in the O'Toole area schools.

[1] "A" refers to the Appendix in the Court of Appeals.

REASONS FOR DENYING THE WRIT.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT OF THE DISTRICT COURT DISMISSING PETITIONERS' COMPLAINT SINCE ITS ALLEGATIONS, TAKEN AS TRUE, DO NOT SHOW A DEPRIVATION OF CONSTITUTIONAL RIGHTS.

Under the provisions of the Illinois Constitution and the Statutes, the respondents have the authority and responsibility to take the very action of which petitioners complain, i.e., establishing school attendance areas, permissive transfer programs, temporary school facilities, reclassification of schools and upper grade centers. The Illinois Constitution (Art. X., Sec. 1) requires the State to provide an efficient system of free public schools. The Illinois School Code (Sec. 34-18, Ch. 122, Ill. Rev. Stats., 1971) gives the Board general supervision and management of the public school system of the city with power to provide schools of all grades and kinds including vocational and technical schools. The Board is therein further authorized to divide the city into sub-districts and proportion the pupils to the several schools provided no pupil is excluded from or segregated in any such school on account of his color, race or nationality.

The complaint fails to allege that there has been any boundary change of the O'Toole or any other school. The complaint further fails to allege that any Board action, in changing school boundaries, transfer plans, temporary school facilities, reclassification of schools, or creation of upper grade centers or any other action, was taken in violation of the Constitution on the basis of race or that any child was excluded from or included in any such program on a racially discriminatory basis.

Instead, the complaint contains conclusions and arguments that unspecified "practices and policies" of respondents are

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producing a "rapid and drastic increase in the number of black students attending schools" (A. 5); that respondents are aware that the "invariable result" has been segregation driving petitioners out of their schools, homes and businesses in spite of their "desire" to remain (A. 6); and that the extension of segregation has been the "foretold, foreknown and inevitable consequence" (A. 7-9).

Under these circumstances, the Court of Appeals properly affirmed the judgment of the District Court, saying in its opinion (a. 3a)[2]:

> "We hold that the District Court did not err in dismissing the petitioners' complaint since the allegations thereof, taken as true, do not show a 'deprivation of constitutional rights' necessary to sustain petitioners' complaint." *Ehrlich* v. *Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970); *Sarelas* v. *Sheehan*, 326 F.2d 490, 491 (7th Cir. 1963); *Kamsler* v. *M.F.I. Corp.*, 359 F.2d 752 (7th Cir. 1966).

The Court of Appeals rightly held, on the basis of a fair reading of the complaint with its allegations taken as true, that said complaint does not state a denial of petitioners' constitutional rights upon which civil rights relief can be granted. The Court said (a. 3a):

> "But a fair reading of the complaint, with the allegations taken as true, clearly *does not state a denial of plaintiffs' constitutional rights upon which civil rights relief can be granted.* General allegations of the Board's misconduct are limited by other statements and assertions which refute the claims of constitutional misconduct. It is plain from the complaint that the O'Toole School attendance boundaries were not purposefully drawn to 'force' whites out or induce blacks to enter. There is no intimation that the operation of the permissive transfer policy discriminated against whites or blacks, or that the construction policies denied equal protection to either

[2] "a" refers to the Appendix to the Petition for Writ of Certiorari.

> race. And plainly there is no basis for an inference that plaintiffs have been deprived of any liberty or property without due process." (emphasis added)

Just as they did in the Court of Appeals, petitioners attempt to beg the question in this case by conclusion and argument (Petition 3,4,11, 12) that respondents' "practices" have caused "rapid and drastic increases" in the numbers of black students and the rate at which whites have left the schools and homes in petitioners' area. There are no facts in the record to support such argument. On the contrary, the complaint (A-13) and petition (p. 1) admit on their face that the racial change in the schools resulted from the rapid racial change in the residential community.

Petitioners nonetheless asked the Court to enter an order to "reduce the percentage of black students" and eliminate the "existing surplus" of such students to a maximum range of 10-25% (A. 15-17). In rejecting such argument and holding that such action would be in direct violation of the Civil Rights Act and the Fourteenth Amendment of the Constitution, the Court of Appeals held (a, 4a):

> "Furthermore, the declaration sought with respect to limiting 'black students' to a 10-25% range within the O'Toole area schools would deny equal protection of the law to the black people desiring to move into the area and to their children desiring to attend the O'Toole School. And there is no substantive constitutional right to any particular degree of racial balance or mixing. *Swann* v. *Board of Education*, 402 U.S. 1, 24 (1971). Finally, assuming defendants are deliberately applying the alleged 'practices and policies', we see no justification–absent a substantial showing of denial of plaintiffs' rights–for a declaration that the policies are individually discriminatory, or for the injunctive relief sought.
>
> The complaint effectually states that racial imbalance results when other whites leave the neighborhood area and its schools, in response to attendance of black students

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exceeding a range of 10-25%. But the Board policy of permitting black student attendance in excess of 10-25% at the racially changing schools is shown by the complaint not to be the legally sufficient cause of subsequent racial imbalance, since the complaint states that whites move away from the area because blacks move in. And plaintiffs have not shown their standing to complain of deprivation of rights from racial imbalance in schools, resulting solely from departure of other whites, in response to an influx of blacks."

II.

THE JUDGMENT AND OPINION OF THE COURT OF APPEALS HEREIN IS NOT IN CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS AND RAISES NO IMPORTANT ISSUE OF FEDERAL LAW.

Petitioners argue (Petition, 7) that this case presents two important questions of constitutional Law: A. Whether "State action," taken with knowledge that its "inevitable consequence", must be segregation, constitutes discrimination violative of equal protection of the laws, and, B. Whether "such State action" violates equal protection of the laws irrespective of "intent".

The simple direct answer to these questions is that: A. The complaint here is devoid of any specific allegation of "State action" of segregation, discrimination, or denial of equal protection of the laws; and, B. In the absence of such "State action" no question of "intent" is in any way involved in this case.

Just as they did in their brief in the Court of Appeals (33, 12-59), petitioners have attempted to confuse the issue in this case by arguing at great length in their petition (8-10, 12-18) that lack of discriminatory intent will not protect "state action producing an inescapably discriminatory effect" (12). The defense in this case has never been based on a contention that no discrimination was intended. Respondents' motion to strike

and dismiss, sustained by the District Court and affirmed by the Court of Appeals, was simply based on the failure of petitioners to state a claim showing petitioners had been deprived of any right, privilege or immunity secured by the Constitution and law. Thus, the cases discussed in the petition, wherein unconstitutional discriminatory action existed and an attempt was made to defend on the basis of lack of discriminatory intent, have no application in the instant case. No discriminatory action is alleged in the complaint here before the Court.

The principal case upon which petitioners rely is *Keyes* v. *School District No. 1, Denver, Colorado*, 303 F. Supp. 279, 289 (D. Colo. 1969); 313 F. Supp. 61, 90 (D. Colo. 1970). The argument made by petitioners in the Court of Appeals, that the policies and practices in *Keyes* were strikingly similar to the ones here, is dead wrong. In this case there is no discriminatory action by respondents in the record. In *Keyes*, the Court found in its opinion (p. 285) that defendants had opened a school in a segregated black area (Barrett) with conscious knowledge it would be a segregated school at the same time that a near-by school in a white area (Stedman) was operating 20% over capacity; Barrett was built as a small school not utilized to relieve overcrowding at Stedman; the Board refused boundary changes recommended by its superintendent to relieve overcrowding at Stedman; other boundary changes added to the black pupil concentration; white students were transferred to white schools; and 28 mobile classrooms were built in the Park Hill area of Denver, resulting in a concentration of Negro enrollment at a time when only 29 such units existed in all of Denver. On the basis of this *de jure* action, unlike the situation in this case, the Court in granting an injunction said at page 287:

> "It is sufficient to say that we are not here faced with the kind of simple or innocent de facto segregation which was found to exist in *Downs*. We have seen that during the ten year period preceding the passage of Resolutions 1520,

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1524 and 1531, the Denver School Board has carried out a segregation policy."

After trial on the merits in *Keyes* the court held (313 F. Supp. 61, 67) that the rescission of the integration plan of the predecessor board was designed to perpetuate segregation and in and of itself an act of *de jure* segregation. However, at page 73 the court stated, with regard to *de facto* segregation, "the rule is that the court cannot order desegregation in order to provide a better balance."

The argument made in the petition (p. 18-20) that respondents have an affirmative duty to ameliorate all manifestations of segregation was effectively disposed of by the Court of Appeals in its opinion in this case, where it stated (a, 4a):

> "If separation in racially imbalanced schools were the result of unlawful discrimination, school officials would be under an affirmative duty to remedy the situation. However, the mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful invidious discrimination. *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, 62 (6th Cir. 1966), *cert. den.* 389 U.S. 847; *Springfield School Comm.* v. *Barksdale*, 348 F.2d 261, 264 (1st Cir. 1965); *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914; *Bell* v. *School, City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924. *See also Offermann* v. *Nitkowski*, 378 F.2d 22, 24 (2nd Cir. 1967).
>
> In all cases cited by plaintiffs, denials of constitutional rights are involved. For example, in *Monroe* v. *Pape*, 365 U.S. 167 (1961), the complaint alleged the invasion and search of the Monroe home by police without a warrant. In *Gommillion* v. *Lightfoot*, 364 U.S. 339 (1960), relief was granted because certain 'boundary changes' would have deprived plaintiffs of their right to vote. In *Goss* v. *Board of Education*, 373 U.S. 683 (1963), black students were limited to transferring to schools where their race represented a majority.

> We hold that plaintiffs' complaint is fatally deficient for lack of a showing of denial of constitutional rights. There is no basis therefore for the contention that defendants have an affirmative duty to 'ameliorate all manifestations' of *de facto* segregation which has developed in the O'Toole area. Absent violation of plaintiffs' constitutional or other federal rights, plaintiffs have no basis for their claim of civil rights relief.
>
> The recent decisions relied on by plaintiffs avail them nothing. In both *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D.Cal. 1970); and *Bradley* v. *Milliken, et al.*, U.S.D.C. (40 U.S.L.W. 2192), there was evidence of discriminatory practices and policies which impinged on plaintiffs' ('black students') constitutional rights to equal school facilities and educational equality."

The respondents submit that the petitioners have utterly failed to show that the judgment and opinion of the Court of Appeals in this case is in conflict with any decision of any other Court of Appeals or that it raises any important issue of Federal law.

CONCLUSION.

The Court of Appeals' judgment and opinion in this case follow judicial precepts. It is in accordance, not in conflict, with prior judicial decisions and sets forth a correct statement of the law. For these reasons, as well as the reasons contained in the body of this brief, respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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